Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
2000 Biennial Review; Spectrum Aggregation	)	WT Docket No. 01-14
Limits for Commercial Mobile Radio Services	)	

To: The Commission

PETITION FOR RECONSIDERATION

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Date: February 13, 2002

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Dobson Communications Corporation,[1] Western Wireless Corporation,[2] and Rural Cellular Corporation[3] (jointly "Petitioners") hereby jointly petition the Commission to reconsider one aspect of its *Report and Order* in the above-captioned proceeding.[4] Petitioners urge the Commission to reconsider and reverse its decision to retain 47 C.F.R. § 22.924, the so-called "cellular cross-interest rule" where an overlap exists in an RSA.[5] Petitioners submit that the Commission should immediately eliminate the rule for RSAs as it has done for overlaps in MSAs. In the alternative, Petitioners request the Commission to sunset the rule

[1] Dobson is a leading provider of rural and suburban commercial mobile wireless services throughout the United States.

[2] Western is the leading provider of cellular service to rural areas in the western United States. The company owns and operates wireless phone systems marketed under the Cellular One® national brand name in 19 states west of the Mississippi River. Western Wireless owns cellular licenses covering about 30% of the land in the continental United States. It owns and operates cellular systems in 88 Rural Service Areas ("RSAs") and 18 Metropolitan Statistical Areas ("MSAs") with a combined population of around 9.8 million people. Through the 2nd quarter 2001, Western Wireless d/b/a Cellular One® was providing service to 1,116,500 customers.

[3] Rural Cellular Corporation is a leading provider of cellular services to rural areas in 14 states.

[4] FCC 01-328 (rel. Dec. 18, 2001), *summarized*, 67 Fed. Reg. 1626 (Jan. 14, 2001) ("*Report and Order*").

[5] *Id.* ¶ 88.

contemporaneous with the sunset date established in 47 C.F.R. § 20.6, the CMRS "spectrum cap" rule.

INTRODUCTION AND SUMMARY

The cellular cross-interest rule was adopted over a decade ago when there were only two wireless carriers in any given geographic market. The rule was designed as a prophylactic measure to prevent undue concentration by prohibiting a licensee for one cellular channel block in a Cellular Geographic Service Area ("CGSA"), or a party that controls or owns a controlling or otherwise attributable interest in such a license, from holding a direct or indirect ownership interest of more than 5% in a licensee for the only other channel block in the market.[6]

Conditions have changed dramatically since adoption of the cellular cross-interest rule. In the *Report and Order*, the Commission recognized that the cellular duopoly no longer exists and that there is now meaningful retail competition in CMRS markets generally:

> *We find that considerable entry has occurred and that meaningful competition is present*, particularly given the presence of such earmarks of competition as falling prices, increasing output, and improving service quality and options.[7]

The Commission found this competition to be sufficient to warrant removal of any direct restriction on cellular cross-interests in MSAs, and the elimination of the spectrum cap for all markets as of January 1, 2003.[8] In fact, the only absolute prohibition on the ownership of CMRS spectrum that will exist after January 2003 is the application of the cellular cross-interest rule left in place for RSAs indefinitely. The agency has asserted that (1) competition in RSAs is

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[6] 47 C.F.R. § 22.924. *See 1998 Biennial Regulatory Review of Spectrum Aggregation Limits for Wireless Telecommunications Carriers; Cellular Telecommunications Industry Association's Petition for Forbearance from the 45 MHz CRMS Spectrum Cap; Amendment of Parts 20 and 24 of the Commission's Rules; Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 15 FCC Rcd 9219, 9227-28 ¶ 15 (1999).

[7] *Report & Order* at ¶ 32 (emphasis supplied); *see also id.* at ¶ 46.

[8] *See id.* at ¶ 7.

generally insufficient to justify elimination of the rule, and (2) the rule is well tailored to the harm it is intended to address.[9] The Commission promised, however, to consider waivers of the rule in circumstances where "it can be shown that an RSA exhibits market conditions under which a specific cellular cross-interest would not create a significant likelihood of substantial competitive harm."[10]

Petitioners submit that the Commission's decision to maintain the cellular cross-interest rule in RSAs is unsupportable, even on the record evidence cited in the *Report and Order*. The Commission's MSA/RSA distinction does not rationally reflect the state of competition or the impact of the rule in specific geographic markets, and is paternalistic and fundamentally arbitrary. Further, and contrary to the Commission's assertion, the rule is not "well tailored" to the harm it seeks to prevent. Continued application of the rule will create significant, adverse business impacts for Petitioners, and other cellular licensees with systems in RSAs by, *inter alia*, limiting the ability to secure financing from entities with 5% or more interest in the other cellular licensee in the RSA to expand and enhance the provision of wireless telecommunications services into these markets, and prohibiting economically efficient mergers. The Commission's promise to consider waivers of the rule is well intentioned but inadequate to resolve these concerns.

Petitioners, therefore, urge the Commission to eliminate the cellular cross-interest rule in all markets — RSAs as well as MSAs — and to consider each transaction under the same case-by-case analysis, which, Petitioners submit, ensures the public interest is served. As Chairman Powell noted in opposing continuation of the spectrum cap, the contrary:

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[9] *Id.* at ¶¶ 88-92.

[10] *Id.* at ¶ 90.

> point of view not only represents a lack of faith in the competitive marketplace, but also completely disregards the fact that Congress provided other vehicles to consider and police those anti-competitive activities they fear.[11]

The same can clearly be said in justifying reconsideration of the decision to retain the cellular cross-interest rule for RSAs. In the alternative, the Commission should establish a sunset date for final expiration of the rule in RSAs contemporaneous with the sunset date of the spectrum cap.

I. THE COMMISSION'S MSA/RSA DISTINCTION FOR PURPOSES OF THE CELLULAR CROSS INTEREST RULE IS ARBITRARY AND CAPRICIOUS

The *Report and Order* establishes a bright line between MSAs and RSAs for purposes of the cellular cross-interest rule. Specifically, the Commission has concluded that the rule "is no longer necessary in urban markets, given the presence of numerous competitive choices for consumers in such markets," and therefore has eliminated the rule in MSAs.[12] In contrast, the Commission found that:

> CMRS markets in rural areas are different from the markets in urban areas, in that, generally, the cellular providers seem to enjoy first-mover advantages and to dominate the marketplace.[13]

The Commission reasoned, therefore, that "it would not be appropriate at this time to eliminate the . . . rule in rural markets."[14]

Petitioners submit that this MSA/RSA distinction is arbitrary and capricious and cannot be maintained. MSAs and RSAs are merely licensing tools; the Commission has not cited any evidence demonstrating a direct correlation between the number of facilities-based carriers in a

[11] *Id.*, Separate Statement of Chairman Michael K. Powell.

[12] *Id.* at ¶ 84.

[13] *Id.* at ¶ 89.

[14] *Id.* at ¶ 88.

geographic market, the impact and quality of the CMRS competition in the market, and whether that market is characterized as an MSA or an RSA. In fact, the *Report and Order* highlights that many RSAs exhibit market conditions involving numerous competitors.[15]

For example, on the basis of its own investigation, the Commission asserts "fifty-six percent of RSA counties have two or fewer facilities-based providers of mobile telephony offering service, presumably in most instances the two cellular licensees," but fails to note the converse conclusion that 44% of RSA counties must have three or more facilities-based providers.[16] The Commission also states that, in MSAs, "eight-six percent of counties have four or more facilities-based CMRS providers that are offering service in some part of the county."[17] Conversely, then, 14% of the counties in MSAs have three or fewer facilities-based competitors.[18] In sum, the decision to eliminate the rule for MSAs but not RSAs is arbitrary and capricious because it results in stricter ownership limitations with respect to licenses in many RSAs with *three or more* facilities-based carriers than for licenses in many MSAs with *three or fewer* competitors. Surely this is not what Chairman Powell intended when he stated:

> The central purpose of communications policy is . . . "to *promote competition* and *reduce regulation* in order to secure lower prices and higher quality services for American telecommunications

[15] A prime example of this situation can be found in the Commission's own back yard. In Frederick, Maryland, an RSA, Dobson faces facilities-based competition from Verizon, Voice Stream, Nextel, AT&T and Sprint. USCellular, a licensee in the adjacent MSA is also providing resale service in Frederick.

[16] *Id.*

[17] *Id.* at ¶ 86.

[18] Petitioners note that, with the evolution of the build-out requirements for C, D, E and F Block PCS licenses, even more facilities-based competitors will be coming on-line in rural markets. Consequently, Petitioners do not believe that the Commission's statistics accurately reflect the competitive situation in rural markets as they will develop throughout 2002.

> consumers and encourage the rapid deployment of new telecommunications technologies."[19]

The Commission's analysis also ignores the fact that the relevant geographic market today is larger than any given RSA,[20] and fails to consider that regional and nationwide affiliations among CMRS carriers regularly allows for similarly priced services to be available in RSAs that are available in the neighboring MSAs as well. In fact, many CMRS services today are typically offered on a national and regional level. From a customer service standpoint, at least, RSAs are not distinct from MSAs; indeed in many cases, the MSA/RSA distinction has been eliminated in "regional" offerings. For example, while providers of CMRS services to suburban and rural markets may not provide a distinct "nationwide" service for all of their customer base (although Petitioners do have such service plans available for many RSAs), such licensees often acquire abutting MSA and RSA licenses so as to provide service across a region rather than one cellular market. The rule would prohibit investment and consolidation transactions involving such regionalized markets by treating the RSA portions of such a regional market different from the MSA without any factual or policy basis for such distinction.

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[19] *Id.*, Separate Statement of Chairman Michael K. Powell, citing Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 (preamble).

[20] Petitioners note that the Commission rejected the use of MSA/RSA boundaries for PCS licenses in part because the areas were too small. "The ten year history of the cellular industry provides evidence generally that these service areas have been too small for the efficient provision of regional or nationwide service." *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 9 FCC Rcd 4957, 4987 ¶ 76 (1994). Similarly, the Commission found that interstate calls within a Metropolitan Trading Area ("MTA") should not be treated as interexchange for rate integration purposes. The Commission reasoned that because of "the mobility of CMRS customers, the MTA, rather than a smaller area, . . . reflects the minimum area in which customers may be expected to travel and within which they would expect not to pay toll charges." *Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section254(g) of the Communications Act of 1934, as Amended; Petitions for Forbearance*, 14 FCC Rcd 391, 401-02 ¶ 22 (1998).

Finally, the Commission's analysis of competition in urban and rural markets apparently considers only the number of facilities-based competitors in a given market. This simplistic "how many competitors are there" test is an inadequate measure upon which to judge whether consolidation or cross-ownership is appropriate in a given market. There are numerous situations in which a cellular merger or cross-ownership in excess of the 5% limitation would serve the public interest, *e.g.*, by invigorating investment and allowing carriers to achieve economies of scope that would facilitate broadband service offerings that the carriers could not make absent the merger. It was for such non-competition benefits that the Commission earlier raised the CMRS spectrum aggregation limit from 45 MHz to 55 MHz in rural areas.[21] The Commission should not now ignore these important public interest concerns by retaining the restrictions of Section 22.942.

In light of the above, Petitioners urge the Commission to reconsider its decision to apply the cellular cross-interest rule in RSAs as a prophylactic, feel-good measure to protect against undue concentration in rural markets.

II. RETAINING THE CELLULAR CROSS-INTEREST RULE IN RSAS WILL HAVE SIGNIFICANT ADVERSE BUSINESS CONSEQUENCES

The Commission's conclusion that the cellular cross-interest rule is "well tailored" to the harm it seeks to prevent is flawed. In fact, continued application of the rule will have significant adverse business consequences for Petitioners and other RSA licensees.

Petitioners are each cellular licensees with licenses in markets across the United States and many of their markets are located in RSAs. Given the geographic scope of Petitioners'

[21] Indeed, the Commission found these benefits outweigh findings that "competition among mobile phone service providers remain[ed] largely underdeveloped, and . . . in many markets consumers [were] able to obtain facilities-based mobile phone services only from the two incumbent cellular carriers." *1998 Biennial Regulatory Review of Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, 15 FCC Rcd at 9257 ¶ 84 (1999).

interests, it is likely that Petitioners compete with almost every other significant cellular licensee in at least some markets. As a consequence, Petitioners are in the difficult position of either limiting the pool of potential merger or financing partners to non-cellular licensees or negotiating transactions that involve disaggregating overlapping cellular markets. The need for "disaggregation" often knocks a potential buyer out of the deal at the very outset. Either result severely limits Petitioners' business opportunities, hampering their ability to compete with nationwide PCS carriers and potentially leading to the perverse result of greater concentration in rural markets.

The Commission's promise to consider waivers for transactions in RSAs does not resolve Petitioners' concerns. First, as a business matter, the necessity of securing a Commission waiver to consummate a transaction makes negotiating that transaction extraordinarily difficult, if not impossible. The uncertainty inherent in the waiver process makes potential partners and financiers much more hesitant to commit to a transaction. Investors simply prefer transactions that do not involve waivers over those that do. Today's market, in which many carriers are pursuing financing from more limited numbers of new sources, exacerbates this fundamental business reality. Moreover, by limiting the potential for mergers, maintaining the rule could hamper carriers' efforts to develop broadband offerings. Business synergies and the acquisition of customers through mergers with other wireless providers often help make the business case for profitable broadband offerings.

Second, the Commission has provided no clarity as to the standards by which it will judge any such waiver request, and thus it is unclear that a waiver process will provide Petitioners with any relief. For example, the general waiver standard requires a showing either that application of the rule would frustrate the underlying purpose of the rule or that unique or

unusual factual circumstances exist.[22] Petitioners question whether they could ever meet this standard. Since the purpose of the cellular cross-interest rule is to prevent consolidation in a market, applying the rule to bar consolidation or cross-interest will never frustrate that purpose. Further, it is unclear how a simple merger or financing transaction among carriers would constitute a unique or unusual factual circumstance; such transactions are common business practices.

Third, the Commission does not comment on whether its general waiver standard will apply, but rather states that waivers will be granted if "it can be shown that an RSA exhibits market conditions under which a specific cross-interest would not create a significant likelihood of substantial competitive harm."[23] This language suggests that the Commission may not apply the general waiver standard, but rather may review waiver requests based upon guidelines virtually identical to those it expects to develop for analyzing the competitive impacts of proposed transactions after the spectrum cap expires on January 1, 2003.[24] If this is correct, then, the only distinction between the Commission's analysis of a transaction in an MSA and an RSA will be procedural, not substantive.

In both cases, the Commission will consider the competitive impacts of a transaction, presumably using the same analysis. That analysis will be conducted through the Commission's general public interest findings for MSA transactions, but through a waiver request for RSA transactions. Although this distinction appears to be mere regulatory form over substance, the differences in procedures adversely effect business. As noted above, a waiver requirement

[22] *See* 47 C.F.R. § 1.925(b)(3).

[23] *Report and Order* at ¶ 90.

[24] *See id.* at ¶ 6.

places significant additional limitations upon carriers that do not exist in MSAs. The Commission fails to justify this disparate treatment.

Further, it is unnecessary and illogical for the Commission to impose the waiver requirement upon licensees in RSAs but not in MSAs. It appears that the Commission will be conducting the same regulatory analysis in both cases. The waiver process in RSAs, therefore, does not serve any significant regulatory purpose. The Commission can resolve competitive concerns regarding a transaction in an RSA through the case-by-case approach just as easily as it does for transactions in MSAs. In essence, then, the Commission's reliance on waivers in RSAs is simply regulation for regulation's sake and imposes undue burdens upon certain licensees with no corresponding regulatory benefit. As Chairman Powell appropriately noted:

> We should now cede to the competitive market and the wonderful consumer benefits that spring from it, yet with our remaining tools we will diligently monitor, police and scrutinize any trends or transactions that will reverse these benefits.[25]

The identical rationale should be applied to the cellular cross-interest rule, and in doing so, the Commission must reconsider its decision to continue to apply the cellular cross-interest rule in RSAs.

[25] *Id.*, Separate Statement of Chairman Michael K. Powell.

CONCLUSION

For the foregoing reasons, Petitioners urge the Commission to remove immediately the rule for MSAs and RSAs. In the alternative, Petitioners ask the Commission not to leave the rule in place indefinitely, but rather to sunset the rule on January 1, 2003, the sunset date for the CMRS spectrum cap rules.

Respectfully submitted,

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Date: February 13, 2002